(2)

Case No.: 91-486

IN THE SUPREME COURT OF THE UNITED STATES

Term: 1991

LEONARD C. HECKMAN, pro se,
Petitioner-Appellant.

v.

MICHAEL J. McCULLION, REGISTRAR
OHIO BUREAU OF MOTOR VEHICLES,
Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, TRUMBULL COUNTY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEE FISHER
Attorney General

CHERYL D. MINSTERMAN
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QUESTIONS PRESENTED

1. Must a due process challenge be raised in a court of competent jurisdiction before an administrative order becomes void?

2. Is the right to a hearing under the due process clause of the fifth and fourteenth amendments automatic, or must the right be affirmatively exercised?

3. May a person challenge the inadequacy of a notice without complying or attempting to comply with the notice that is given?

STATEMENT OF THE CASE

This case arose on May 2, 1979, when Petitioner's Pennsylvania driving privileges were suspended indefinitely for failure to satisfy a judgment. Pennsylvania reported the suspension to the National Driver Registry (hereinafter "NDR"), a national computer network that allows states access to the driving record of a resident of the member states. Subsequently, Petitioner applied for and received an Ohio driver's license. Thereafter, the Ohio Bureau of Motor Vehicles (hereinafter "Bureau") ran a search through the NDR and learned of Petitioner's Pennsylvania suspension.

Upon learning of said suspension, on August 20, 1987, the Bureau notified Petitioner that his Ohio license would be cancelled if he did not submit a letter of clearance from Pennsylvania. No letter of clearance was received by the Bureau. Consequently, on September 22, 1987, the Bureau notified Petitioner that his Ohio license was cancelled based on the Pennsylvania suspension. In that same letter, the Bureau advised the Petitioner to contact the Bureau to learn how to regain his Ohio license. Had Petitioner contacted the Bureau, he would have learned that he was entitled to request an administrative hearing that would have stayed the cancellation of his license.

Petitioner failed to request an administrative hearing. Instead, he proceeded directly to the Niles, Ohio, Municipal Court for relief. The Bureau moved to dismiss for failure to exhaust administrative remedies. The court overruled said motion. The Bureau then moved to vacate. On November 3, 1989, the court issued its decision denying the motion to vacate and finding for Petitioner. From this judgment, the Bureau appealed to the court of appeals.

In the appellate court, both parties filed briefs. However, due to the extreme untimeliness of his brief, Petitioner was denied oral argument. On appeal, the Bureau argued, *inter alia*, that the lower court lacked jurisdiction to hear and decide the case, as any appeal should have been brought in the common pleas court. The appellate court found in

favor of the Bureau on the jurisdiction argument and reversed the decision of the lower court. Thus, the license cancellation was reinstated.

Petitioner then attempted to appeal to the Ohio Supreme Court and timely filed a Memorandum in Support of Jurisdiction. The court overruled the motion and dismissed the appeal for lack of a substantial constitutional question. Petitioner now seeks to appeal to this Court.

SUMMARY OF THE ARGUMENT

Petitioner asserts that he is entitled to a hearing before his Ohio driver's license may be cancelled or revoked. The Bureau of Motor Vehicles does not dispute such a contention, and in fact, the laws of the state of Ohio support such a contention by affording an administrative hearing. However, the hearing is not self-activating. Petitioner must request the hearing in order to receive the hearing. Petitioner was notified to contact the Bureau of Motor Vehicles. He failed to take any steps to contact the Bureau or exercise his appeal rights. Therefore, he cannot now be heard to challenge the Bureau's failure to afford him a hearing he never requested.

Petitioner also asserts that the notice sent to him by the Bureau of Motor Vehicles was inadequate. However, once again, it is Petitioner's own failure which caused the cancellation of his driver's license. Had he taken the steps set forth in the cancellation notice, he would have learned that he was entitled to a hearing. Petitioner cannot sit idly by, ignoring the notice that was given to him, and later challenge that notice. Yet this is exactly what Petitioner has done, and he now asks this Court to afford him opportunities which he himself chose not to exercise.

Petitioner also alleges that the Eleventh District Court of Appeals was without authority to reinstate the cancellation of his license. The substance of this claim is that, because he was not afforded appropriate notice, the cancellation of his license was void *ab initio*. However, it is axiomatic that regularity of an administrative agency is presumed. Therefore, the cancellation should be presumed to be enforceable, until it is reversed by a court of *competent* jurisdiction. Petitioner raised his challenges in the municipal court. However, that court lacked jurisdiction to hear and decide the appeal, as Petitioner had been granted an Ohio license. Appellant should have brought his appeal in the common pleas court in the county in which he resided. His failure to properly invoke jurisdiction of the court denied him the opportunity to raise his constitutional challenges. Therefore, when he failed to appeal to the appropriate court,

the court of appeals was within its power to reverse the decision of the lower court, thereby reinstating the cancellation of Petitioner's Ohio driver's license.

ARGUMENT

In his Motion, Petitioner asserts three issues. Some of these issues he has raised in his previous appeals, although not all of them were raised in his initial appeal to the Niles Municipal Court. However, Petitioner fails to inform the Court that, when he received his cancellation notice, he appealed to the Niles Municipal Court. This appeal was dismissed because Appellant's driver's license had been cancelled, not denied, and the Municipal Court has jurisdiction only over license denials based on outstanding suspensions or revocations.

Petitioner then reapplied for a license, which obviously was denied because of the outstanding cancellation. Nonetheless, Petitioner again appealed to the Niles Municipal Court, which then granted the appeal. Despite the fact that Petitioner deliberately circumvented the statutory intent in order to invoke jurisdiction in a more favorable forum, the municipal court still lacked jurisdiction. Petitioner had not been denied an Ohio driver's license based on an outstanding suspension or revocation. Thus, the municipal court lacked jurisdiction. Petitioner fails to address this contention in his motion. However, Respondent will address this contention fully. Respondent also will address each of Petitioner's issues, though not necessarily in the order he has presented them.

I. A DECISION OF AN ADMINISTRATIVE AGENCY IS PRESUMED VALID UNTIL IT IS DECLARED INVALID BY A HIGHER AUTHORITY WITH JURISDICTION TO MAKE SUCH A DECLARATION.

Petitioner asserts that, because the notice of cancellation did not comply with statutory and due process requirements, it is void *ab initio*. Such a contention cannot stand. Logic and reason alone require that an agency's decision must be presumed valid until a higher entity with authority to review the decision strikes down the decision. Any other result would promote anarchy, allowing any individual to

declare his due process rights violated, thereby permitting him to ignore the agency's decision.

Administrative agencies are afforded a presumption of regularity. The law presumes that administrative agencies act according to law, and therefore, their decisions are presumed valid. *Oesterich v. Selective Service System Local Board No. 11,* 393 U.S. 233 (1968) (footnotes 17 and 18); *Pacific States Box and Basket Co. v. White,* 296 U.S. 176 (1935); *Baltimore & Ohio R.R. Co. v. Brady,* 288 U.S. 448 (1933), *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71. It follows, then, that an agency decision must be declared invalid before the affected individual may refuse to abide by the decision. Such a declaration must come from an entity granted the jurisdiction and power to make such a declaration.

The Ohio Supreme Court has held unequivocally that there is no right to appeal an administrative decision except as conferred by statute. *Lindblom v. Board of Tax Appeals* (1949), 151 Ohio St. 250. Incumbent within that right of appeal is the mandatory requirement that an individual file his notice of appeal with the proper court. The failure to file with the correct court must result in a dismissal of the appeal. *Zier v. Bureau of Unemployment Compensation* (1949), 151 Ohio St. 123; *Griffith v. J.C. Penney Co., Inc.* (1986), 24 Ohio St. 3d 112.

It is the contention of the Bureau that Petitioner failed to file a notice of appeal with the proper court. Ohio Revised Code (hereinafter "O.R.C.") 4507.08(E) (formerly O.R.C. 4507.08(D)) prohibits the granting or retention of an Ohio driver's license to or by someone whose license is suspended in another state. Pursuant to that statute, anyone whose license is denied may file a petition in the municipal or county court in whose jurisdiction the individual resides. However, Petitioner's application was not denied; he was granted a license, and that license was later cancelled. Thus the appeal procedures for license application denials do not apply to Petitioner.

Ohio courts have been presented with the opportunity

to review the issue of a cancellation of a driver's license. In *City of Columbus v. Sliker* (1986), 30 Ohio App. 3d 74, the Tenth Appellate District likened a cancellation to a revocation. Therefore, it determined, any appeal rights were governed by the Administrative Procedure Act as codified in O.R.C. Chapter 119, specifically O.R.C. 119.12, which required the notice of appeal to be filed in the common pleas court in the county where the individual resided.

This is precisely the reasoning adopted by the state Eleventh Appellate District in rendering its decision. That court recognized that Petitioner's license had been cancelled, not denied. Therefore, any appeal would have to be filed in the common pleas court where Petitioner resided. But Petitioner brought his appeal in the Niles Municipal Court, which lacked jurisdiction to consider Petitioner's appeal.

Petitioner argues that, even if the Niles Municipal Court lacked jurisdiction, the court of appeals could not reinstate the cancellation. On the contrary, this is precisely what should occur. If the municipal court lacked jurisdiction to hear and decide a case, its decision must be reversed and the case dismissed. *Zier, supra.* Thus, when the appeal is dismissed, the cancellation again became effective. Clearly, the appellate court acted properly in reversing the decision of the municipal court and dismissing the appeal, reinstating the cancellation.

II. A HEARING NEED NOT OCCUR BEFORE A DRIVERS LICENSE MAY BE REVOKED; HOWEVER THE OPPORTUNITY FOR A HEARING MUST BE AFFORDED PRIOR TO OR IMMEDIATELY SUBSEQUENT TO THE REVOCATION.

Petitioner argues that he was entitled to a hearing before his Ohio driver's license was cancelled. The Bureau does not dispute this contention. However, the Bureau does dispute that the *hearing* must occur prior to or immediately following the license cancellation. Rather, it is the contention

of the Bureau that the licensee must be *afforded* the *opportunity* for a hearing. The licensee must then request the hearing. If no request for a hearing is made, no hearing need be held, and the license cancellation may proceed without a hearing.

The cases cited by Petitioner clearly support the Bureau's contention. In *Bell v. Burson,* 402 U.S. 535 (1971), this Court held that due process requires that a state must *afford* "notice and an *opportunity* for hearing . . .". The Court did not require that the hearing must occur. Clearly, the intent is that the opportunity for a hearing must be offered, but need only occur if the licensee requests the hearing.

Ohio law affords such an opportunity. O.R.C. 4507.08(E) prohibits the retention of an Ohio driver's license when a similar license is under revocation or suspension in another state. However, said statute makes no reference to the right to a hearing, except when a license application is denied. In the within proceeding, Petitioner's application was not denied; he was granted a license. Thus, the general administrative hearing requirements, as codified in O.R.C. Chapter 119, become applicable.

O.R.C. 119.06 mandates that no adjudication order of an administrative agency, such as the Bureau, is valid unless an opportunity for a hearing is afforded. O.R.C. 119.06 - 119.09 afford an opportunity for a hearing, with which the Bureau must and does comply. The Bureau at all times remained ready, willing and able to hold a hearing on Petitioner's request. However, Petitioner never requested a hearing. The Bureau is under no duty or obligation to hold a hearing where none has been requested, and none of the authorities cited by Petitioner support such a conclusion.

Thus, Petitioner's arguments are irrelevant. It is true that he is entitled to a hearing, and the Bureau so concedes. But for the hearing to occur, Petitioner must request it. Certainly affording the right to a hearing does not mandate the exercise of the right. Therefore, Petitioner's arguments are irrelevant.

III. A LICENSEE HAS A DUTY TO PURSUE THE NOTICE THAT IS GIVEN TO HIM AND MUST TIMELY RAISE ANY INADEQUACIES IN THE NOTICE AT THE FIRST AVAILABLE OPPORTUNITY.

Petitioner argues that he received no notice that he had a right to an administrative hearing. However, Petitioner was notified that his Ohio driver's license would be cancelled and the reasons for the cancellation. He also was advised to contact the Bureau on how to regain his driving privileges. Petitioner failed to contact the Bureau of Motor Vehicles.

He who seeks equity must do equity. While equity principles are not at issue here, an analogy is appropriate. Petitioner was given some notice and was advised to contact the Bureau. This he failed to do. Instead, he chose to ignore the advice and proceed directly to court. Petitioner had some duty to pursue the information he was given. It is both unreasonable and unfair to allow Petitioner to sit idly by and ignore clear advice only to reap a benefit from his own idleness. Yet this is precisely what Petitioner seeks to do by challenging the inadequacy of the notice. Such a challenge should not be permitted.

Furthermore, it is the contention of the Bureau that Petitioner waived his right to challenge the adequacy of the notice when he failed to raise this challenge in the Niles Municipal Court. Nothing in the record certified to the Eleventh District Court of Appeals indicated that Petitioner raised such a challenge. Thus, Petitioner has waived his right to raise such a challenge.

The doctrine of waiver operates when an individual has had an opportunity to raise any defense or challenge, and has failed to do so. Under Ohio law, any challenge or defense must be raised at the first available opportunity, or it is waived. *State v. Morris* (1975), 42 Ohio St. 2d 307; *Schade v. Carnegie Co.* (1972), 70 Ohio St. 2d 207. As previously stated, Petitioner's first opportunity to raise any challenges to the notice came when he filed his petition in the Niles Municipal

Court. His failure to timely raise his challenge then waived any right or opportunity to raise that challenge at a later date, including in his Petition for Writ of Certiorari.

CONCLUSION

Petitioner's Motion for Writ of Certiorari should be denied for failure to present a constitutional question. Petitioner does have a right to a hearing before his driver's license is cancelled, and Ohio law affords such a hearing. However, Petitioner must avail himself of this opportunity to reap its benefits. If he does not request a hearing, the cancellation remains in effect.

Nor can Petitioner challenge the adequacy of the notice when he failed to avail himself of the notice that was given. Additionally, any challenge to the adequacy of the notice must be raised at the first available opportunity. Petitioner waived his opportunity to raise such a challenge when he failed to raise it before the municipal court.

Finally, and most importantly, even if the notice is inadequate, the agency's decision remains valid until it is declared invalid. Only a court of competent jurisdiction may make such a declaration. In the within proceeding, Petitioner deliberately manipulated the statutory process in order to invoke the jurisdiction of a more favorable forum. However, Petitioner cannot refute that his license was cancelled because of an out-of-state revocation or suspension. Nothing in the record supports the contention that he was denied a license for this reason. Thus, the Niles Municipal Court never had jurisdiction over Petitioner's appeal. Therefore, the appellate court lawfully reversed the decision of the municipal court and dismissed the appeal. Because the Bureau's decision had not been declared invalid, it thus remained valid. Petitioner's contentions clearly are without merit.

WHEREFORE, based upon the foregoing, Petitioner's Motion for Writ of Certiorari should be overruled and denied.

Respectfully submitted,

LEE FISHER
Attorney General

Cheryl D. Minsterman

CHERYL D. MINSTERMAN
Assistant Attorney General
Counsel for Record for
Ohio Bureau of Motor Vehicles
State Office Tower, 23rd Floor
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-2980

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded to Leonard C. Heckman, *pro se*, 1163 Swallow Street SW, Warren, Ohio 44485, via the U.S. Mail, this 25th day of October, 1991.

Cheryl D. Minsterman
CHERYL D. MINSTERMAN
Assistant Attorney General

(Seal of the
State of Ohio)
Department of Highway Safety
Bureau of Motor Vehicles
Richard F. Celeste
Governor

OHIO
DEPARTMENT OF HIGHWAY SAFETY
BUREAU OF MOTOR VEHICLES
P. O. Box 16520 COLUMBUS, OHIO 43266-0020
(614) 752-7500
7:00 a.m. to 6:00 p.m. M-F
BUREAU HOURS HOURS 8:00 a.m. to 4:45 p.m. M-F

AUGUST 20, 1987

LEONARD C. HECKMAN
2429 PLEASANT VALLEY
NILES, OHIO 44446

RE: State: PENNSYLVANIA
License # PF 611191

According to the National Driver Registry, your driving privileges are under suspension in the above mentioned state. If you wish to retain driving privileges in the State of Ohio, you must obtain a letter of clearance from the above state and forward it to this Bureau.

If within thirty (30) days we have not received the letter of clearance, your Ohio driver license will be cancelled.

(Signature of Michael J. McCullion)

MICHAEL J. McCULLION
REGISTRAR
akn

OHIO BUREAU OF MOTOR VEHICLES
Attention: Drivers-National Driver Registry
P. O. Box 16520
Columbus, Ohio 43266-0020

BMV 2102 8/86

(Seal of the
State of Ohio)
Department of Highway Safety
Bureau of Motor Vehicles
Richard F. Celeste
Governor

OHIO
DEPARTMENT OF HIGHWAY SAFETY
BUREAU OF MOTOR VEHICLES
P. O. Box 16520 COLUMBUS, OHIO 43266-0020
(614) 752-7500
BUREAU HOURS HOURS 8:00 a.m. to 4:45 p.m. M-F

SEPTEMBER 22, 1987

LEONARD C. HECKMAN
2429 PLEASANT VALLEY
NILES, OHIO 44446

RE: DR70922

License # PF611191

[ ] License on File
[X] License must be returned
to Bureau immediately

Action: CANCELLATION

Effective: SEPTEMBER 22, 1987
UNTIL INDEFINITE

You are hereby notified, that as provided by the State of Ohio, your driving privileges and driver license indicated above, have been cancelled.

REASON Report received from National Drivers Registry.

This license or duplicate thereof, issued in your name is NOT valid at this time.

In order to regain your driving privileges, you must contact the Ohio Bureau of Motor Vehicles at the address below. When making inquiries, please have the case number indicated above available.

MICHAEL J. McCULLION
REGISTRAR

OHIO BUREAU OF MOTOR VEHICLES
Attention: National Driver Registry
P. O. Box 16520
Columbus, Ohio 43266-0020

MJM:TLC:akn
BMV 2108 1/87

IN THE NILES MUNICIPAL COURT
NILES, OHIO

LEONARD C. HECKMAN,	)	CASE NO. 88 H 1038
	)	
Plaintiff	)	JUDGMENT ORDER
	)	
-vs-	)	
	)	
STATE OF OHIO, BUREAU OF MOTOR VEHICLES,	)	
	)	
	)	
Defendant	)	

Appellant filed this appeal pursuant to O.R.C. 4507.08(D). Appellant, in December, 1988 applied for an Ohio drivers license after having held a Pennsylvania drivers license. His application was denied.

The record supplied by the Ohio Bureau of Motor Vehicles in this petition and in a prior appeal that Mr. Heckman had improperly filed do reveal a Pennsylvania Suspension arising from a Judgment, or non-payment of a Judgment Order. If the Judgment had been obtained in Ohio, the Judgment would no longer be valid, but would be dormant. Upon the basis of the Bureau record presented, the Court sustained the applicant's petition. The Bureau's request to vacate is overruled.

Dated at Niles, Ohio, this 3rd day of November, 1989.

(signature-Thomas W. Towsley)
JUDGE

Journalized this 3rd day of November, 1989.

Barry L. Profato

Clerk of Courts

(signature-Regina J. Wolfe)
By: Deputy Clerk

(File Stamp)
Nov. 3, 1989
Office of Clerk Municipal Court
Niles, Ohio

COURT OF APPEALS
ELEVENTH DISTRICT
TRUMBULL COUNTY, OHIO

JUDGES

LEONARD C. HECKMAN,

Plaintiff-Appellee,

- vs -

MICHAEL J. McCULLION REGISTRAR, OHIO BUREAU OF MOTOR VEHICLES,

Defendant-Appellant.

HON. JUDITH A. CHRISTLEY, P.J.,
HON. EDWARD J. MAHONEY, J., Ret.,
Ninth Appellate District,
sitting by assignment,
HON. WILLIAM R. BAIRD, J.,
Ninth Appellate District,
sitting by assignment.

CASE NO. 89-T-4328

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Niles Municipal Court Case No. 88 H 1038

JUDGMENT: Reversed.

ATTY. WILLIAM ROUX
305 Bank One Building
106 E. Market Street
Warren, Ohio 44481

(For Plaintiff-Appellee)

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL

CHERYL D. MINSTERMAN
ASSISTANT ATTORNEY GENERAL

(File Stamp)
FILED
Court of Appeals
Dec. 17, 1990
Trumbull County, Ohio
Margaret R. O'Brien, Clerk

30 E. Broad Street
State Office Tower
Columbus, Ohio 43266

(for Defendant-Appellant)

CHRISTLEY, P.J.

This case arose from a cancellation of a driver's license. Appellant, Ohio Bureau of Motor Vehicles, contacted appellee, Leonard C. Heckman, on August 20, 1987, notifying him that if he did not obtain a letter of clearance from Pennsylvania, his Ohio driving privileges would be cancelled. On September 22, 1987, appellant notified appellee that his driving privileges and driver license had been cancelled. Appellant further informed appellee if he wished to regain his driving privileges that he must contact appellant. Once again on June 8, 1988, appellant informed appellee that his driver's license was cancelled and that appellee must returned (sic) his license to appellant.

Then, for reasons not apparent from the record and which were not addressed in the briefs, appellee received from the Ohio Bureau of Motor Vehicles a notice of *suspension* pursuant to R.C. 4507.30(D) and/or R.C. 4509.77. While R.C. 4509.77 covers a suspension, R.C. R.C. 4507.30(D) pertains to both the suspension and the cancellation of a driver's license. Despite the ambiguity created by a notice of suspension rather than cancellation, the Ohio Bureau of Motor Vehicles files, which were before the trial court, clearly indicated that appellee's driver's license was cancelled indefinitely as of September 22, 1987.

Prior to this suit, appellee filed a petition in municipal court incorrectly titling it "a petition for an order declaring suspension improper," which was subsequently dismissed. Appellee then reapplied on December 22, 1988 for a driver's license, and was told that he could not be issued a license.

On December 30, 1988, appellee again incorrectly petitioned the Niles Municipal Court for an order declaring the suspension of appellee's driver's license to be improper.

A hearing was held on January 27, 1989. In both appellant's motion to dismiss and motion to vacate, appellant informed the court that appellee's license had been cancelled. The trial court continued to exercise jurisdiction and sustained appellee's petition. It lifted the suspension and permitted appellee to apply for an Ohio driver's license.

It is from this November 3, 1989 judgment that appellant timely filed its notice of appeal raising the following assignment of error:

> "The Court below erred in granting judgment for Appellee when he failed to exhaust administrative remedies."

Appellant argues that the municipal court did not have jurisdiction to hear this case; and, therefore, the lower court's decision should be reversed and the decision of the Bureau of Motor Vehicles reinstated. Originally, appellant's license was cancelled pursuant to R.C. 4507.08(D). In pertinent part, at the time of the proceeding, the statute stated as follows:

> "(D) Any person making an application who holds or has held a current operator's or a chauffeur's license issued to him by another jurisdiction and such license is under revocation or suspension in the jurisdiction where issued, until the expiration of one year after the license was revoked or until the period of suspension ends. Any person whose application is denied under this division may file a petition in the municipal court or county court in whose jurisdiction the person resides agreeing to pay the cost of the proceedings and alleging that the conduct involved in the offense that resulted in suspension or revocation in the foreign jurisdiction would not have resulted in a suspension or revocation had the offense occurred in this state. If the petition is granted, petitioner shall notify the registrar of motor vehicles by a certified copy of the court's findings and a license shall not be denied under this division."

In order to invoke R.C. 4507.08(E), formerly R.C. 4507.08(D), an individual must be denied a license due to the revocation or suspension of his driving or registration privileges in another jurisdiction. Since appellee's license was cancelled, the statute does not apply to the present case.

In *Columbus v. Sliker* (1986), 30 Ohio App. 3d 74, the Tenth District held that a license which was *cancelled* pursuant to R.C. 4507.08 was "subject to the provision of R.C. 119.06, which requires a hearing using the procedures specified in R.C. Chapter 119." *Id.* at 76.

The *Sliker* court reasoned that R.C. 4507.08(D) provided that any person whose application was *denied* may filed (sic) a petition in the appropriate court. On the other hand, as in the case presently before the court, "[t]here [was] no provision in R.C. 4507.08 about the method to be used to *cancel* a license that was allegedly wrongly issued, as was the intent of the Bureau of Motor Vehicles in this case." *Id.* at 76. (Emphasis added.) Therefore, in *Sliker,* the court concluded that R.C. 119.06 applied.

Specifically, the record before us reflected that appellee's license was *cancelled,* as opposed to denied. The trial court had notice of this in both appellant's motion to dismiss and motion to vacate, as well as in the Bureau's file which was before the trial court. The cancellation was in the nature of revocation. As such, the right to appeal the cancellation was governed by R.C. 119.06 and 119.09. *Sliker, supra.*

Even if appellee did have a judicial remedy available before exhausting his administrative remedies, appellee needed to direct his appeal to the court of common pleas, not municipal court. R.C. 119.12 provides the revocation or suspension of a license may be appealed to the court of common pleas of the county in which the licensee is a resident. Appellee filed in municipal court, not the court of common pleas.

The municipal court was without jurisdiction to hear a challenge to the *cancellation* of appellee's driver's license. When a party fails to file in a court of proper jurisdiction,

the appeal must be dismissed. *Zier v. Bureau of Unemployment Compensation* (1949), 151 Ohio St. 123; *Griffith v. J.C. Penney Co., Inc.* (1986), 24 Ohio St. 3d 112. Although appellant did not raise the issue of subject matter jurisdiction before this appeal, the lack of such jurisdiction may be raised at any stage of the proceeding, and cannot be waived. *Gates Mills Investment Co. v. Parks* (1971), 25 Ohio St. 2d 16; *Bomanite Designs, Inc. v. LeBail* (Oct. 26, 1990), Lake App. No. 89-L-14-139, unreported at 9.

Despite appellee's attempt to circumvent the procedure by applying for a license, (which was of course denied) he cannot claim a right of appeal under R.C. 4507.08(D) until he clears up the previous cancellation. Once appellee's license was cancelled, his subsequent applications would be continually denied based on the original cancellation, not the suspension or revocation by a foreign jurisdiction.

Regardless of the notice of suspension which confused the issue, the actual status of appellee's license was cancellation. Presumably, the trial court proceeded with this case under the impression that appellee's license was suspended in another jurisdiction. Despite the trial court's presumption of jurisdiction, the evidence before the court confirmed that appellee was denied a license on December 22, 1988, because the Ohio Bureau of Motor Vehicles had *cancelled* his license. The reason for that cancellation is irrelevant in terms of the available remedies.

In light of the above, the municipal court was without jurisdiction to entertain appellee's petition. Accordingly, the municipal court's judgment is reversed as being void and the decision of the Bureau of Motor Vehicles is reinstated.

(signature)
JUDITH A. CHRISTLEY
PRESIDING JUDGE

MAHONEY, J., Ret., sitting by assignment,

BAIRD, J., Ninth Appellate District, sitting by assignment,

concur.

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) SS	ELEVENTH DISTRICT
COUNTY OF TRUMBULL	)	

LEONARD C. HECKMAN,

Plaintiff-Appellee,

-vs-

MICHAEL J. McCULLION, REGISTRAR, OHIO BUREAU OF MOTOR VEHICLES

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 89-T-4328

For the reasons stated in the Opinion of this Court, the municipal court's judgment is reversed as being void and the decision of the Bureau of Motor Vehicles is reinstated.

(signature)
JUDITH A. CHRISTLEY
PRESIDING JUDGE

FOR THE COURT

MAHONEY, J., Ret., Ninth Appellate District, sitting by assignment.

BAIRD, J., Ninth Appellate District, sitting by assignment.

(File stamp)
FILED
COURT OF APPEALS
Dec. 17, 1990
TRUMBULL COUNTY, OHIO
MARGARET R. O'BRIEN, Clerk

THE SUPREME COURT OF OHIO

1991 TERM

To wit: May 1, 1991

Leonard C. Heckman, Appellant,	:	Case No. 91-338
v.	:	ENTRY
Michael J. McCullion, Registrar, Ohio Bureau of Motor Vehicles, Appellee.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Trumbull County to certify its records, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed *sua sponte* for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40,00, paid by James A. Tadla.

(Court of Appeals No. 89T4328)

(signature)

THOMAS J. MOYER
Chief Justice

§ 119.06 Adjudication order of agency valid and effective; hearings; periodic registration of licenses.

No adjudication order of an agency shall be valid unless the agency is specifically authorized by law to make such order. No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

The following adjudication orders shall be effective without a hearing:

(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of court;

(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;

(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency, to another agency, or to the board of tax appeals, and also give the appellant a right to a hearing on such appeal.

When a statute permits the suspension of a license without a prior hearing, any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims that the law does not impose such a requirement.

Every agency shall afford a hearing upon the request of

any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, unless a hearing was held prior to the refusal to issue such license, and except that the state medical board is not required to afford a hearing to a person to whom the board has refused to issue a new license because the person failed a licensing examination.

When periodic registration of licenses is required by law the agency shall afford a hearing upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.

§ 119.07 Notice of hearing; contents; notice of order of suspension of license; publication of notice; effect of failure to give notice.

Except when a statute prescribes a notice and the persons to whom it shall be given, in all cases in which section 119.06 of the Revised Code requires an agency to afford an opportunity for a hearing prior to the issuance of an order, the agency shall give notice to the party informing him of his right to a hearing. Such notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for such proposed action, the law or rule directly involved, and a statement informing the party that he is entitled to a hearing if he requests it within thirty days of the time of mailing the notice. The notice shall also inform the party that at the hearing he may appear in person, by his attorney, or by such other representative as is permitted to practice before the agency, or may present his position, arguments, or contentions in writing and that at the hearing he may present evidence and examine witnesses appearing for and against him. A copy of such notice shall be mailed to attorneys or other representatives of record representing the party. This paragraph does not apply to situations in which such section provides for a hearing only when it is requested by the party.

When a statute specifically permits the suspension of a license without a prior hearing, notice of the agency's order shall be sent to the party by registered mail, return receipt requested, not later than the business day next succeeding such order. Such notice shall state the reasons for the agency's action, cite the law or rule directly involved, and state that the party will be afforded a hearing if he requests it within thirty days of the time of mailing the notice. A copy of such notice shall be mailed to attorneys or other representatives of record representing the party.

Whenever a party requests a hearing in accordance with this section and section 119.06 of the Revised Code, the agency shall immediately set the date, time, and place for such hearing and forthwith notify the party thereof. The date

set for such hearing shall be within fifteen days, but not earlier than seven days, after the party has requested a hearing, unless otherwise agreed to by both the agency and the party.

When any notice required by sections 119.01 to 119.13, inclusive, of the Revised Code, to be sent by registered mail, is returned because of inability to deliver, the notice required shall be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the last known place of residence or business of the party is located. A copy of the newspaper, with the first publication of said notice marked, shall be mailed to the party at such address and the notice shall be deemed received as of the date of the last publication.

The failure of an agency to give the notices for any hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, in the manner provided in this section shall invalidate any order entered pursuant to such hearing.

§119.09 Adjudication hearing.

As used in this section "stenographic record" means in the case of a hearing before the state personnel board of review, a record provided by stenographic means or by the use of audio electronic recording devices, as the board determines.

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires, and it may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas, and for that purpose the agency may, and upon the request of any party receiving notice of said hearing as required by section 119.07 of the Revised Code, shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The fees and mileage of the sheriff and witnesses shall be the same as that allowed in the court of common pleas in criminal cases. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of

disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein. At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13 of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party, otherwise such a record shall be made at every adjudication hearing from which an appeal to court might be taken.

The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may call any party to testify under oath as upon cross-examination.

The agency, or any one delegated by it to conduct an adjudication hearing, may administer oath or affirmations.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may appoint a referee or examiner to conduct said hearing. He shall have the same powers and authority in conducting said hearing as granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and

be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

§119.12 Appeal by party adversely affected.

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination; or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 [4301.25.2] of the Revised Code, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, provided that appeals from decisions of the liquor control commission may be to the court of common pleas of Franklin county and appeals from decisions of the state medical board, chiropractic examining board, and board of nursing shall be to the court of common pleas of Franklin county. If any such party is not a resident of and has no place of business in this state, he may appeal to the court of common pleas of Franklin county.

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county, except that appeals from orders of the fire marshal issued under Chapter 3737. of the Revised Code may be to the court of common pleas of the county in which the building of the aggrieved person is located.

This section does not apply to appeals from the department of taxation.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by the appellant with the court. Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section. For purposes of this paragraph, an order includes a determination appealed pursuant to division (C) of section 119.092 [119.09.2] of the Revised Code.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. If an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section, such suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of such suspended order during the period of the appeal from the decision of the court of common pleas. In the case of an appeal from the state medical board or chiropractic examining board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. This provision shall not be construed to limit the factors the court may consider in determining whether to suspend an order of any other agency pending determination of an appeal.

The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the liquor control commission that suspends or revokes a permit issued under Chapter 4303. of the Revised Code, or that allows the payment of a forfeiture under section 4301.252 [4301.25.2] of the Revised Code, shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, even if the matter has not been finally adjudicated with that time.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the

affect of an order of the state medical board or chiropractic examining board that limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of such a certificate shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, or upon the rendering of a final decision or order in the appeal by the court of common pleas, whichever occurs first.

Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. Such record shall be prepared and transcribed and the expense of it shall be taxed as a part of the costs on the appeal. The appellant shall provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on such appeal and shall give preference to all proceedings under sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on

the calendar of the court. An appeal from an order of the state medical board issued pursuant to division (D) of section 4731.22 of the Revised Code or the chiropractic examining board issued pursuant to section 4734.101 [4734.10.1] of the Revised Code shall be set down for hearing at the earliest possible time and takes precedence over all other actions. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section.

The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken either by the party or the agency, shall proceed as in the case of appeals in civil actions, and shall be pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. Such appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record.

The court shall certify its judgment to such agency or take such other action necessary to give its judgment effect.

§ 4507.08 Restrictions on issuance of license.

No driver's license shall be issued to any person under eighteen years of age, except a probationary license may be issued to a person over sixteen years of age and a restricted license may be issued to a person who is fourteen or fifteen years of age upon proof of hardship satisfactory to the registrar of motor vehicles. No probationary license shall be issued to any person under the age of eighteen who has been adjudicated unruly, delinquent, or a juvenile traffic offender for having committed any act that if committed by an adult would be a drug abuse offense as defined in section 2925.01 of the Revised Code, or a violation of division (B) of section 2917.11, or section 4511.19 of the Revised Code, unless the person has been required by the court to attend a drug abuse or alcohol abuse education intervention, or treatment program specified by the court and has satisfactorily completed the program.

No temporary instruction permit or driver's license shall be issued to any person whose license has been suspended, during the period for which the license was suspended, nor to any person whose license has been revoked, under sections 4507.01 to 4507.39 of the Revised Code, until the expiration of one year after the license was revoked.

No temporary instruction permit or driver's license shall be issued to, or retained by:

(E) Any person making an application whose driver's license or driving privileges are under revocation or suspension in the jurisdiction where issued or any other jurisdiction, until the expiration of one year after the license was revoked or until the period of suspension ends. Any person whose application is denied under this division may file a petition in the municipal court or county court in whose jurisdiction the person resides agreeing to pay the cost of the proceedings and alleging that the conduct involved in the offense that resulted in suspension or revocation in the foreign jurisdiction would not have resulted in a suspension or revocation had the offense occurred in this state. If the

petition is granted, petitioner shall notify the registrar of motor vehicles by a certified copy of the court's findings and a license shall not be denied under this division.